RE TAN SRI RAJA KHALID BIN RAJA HARUN INSPECTOR-GENERAL OF POLICE v. TAN SRI RAJA KHALID BIN RAJA HARUN

[S.C. (Salleh Abas L.P., Hashim Yeop A. Sani and Wan Hamzah S.C.JJ.), November 3 & 17, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 36 of 1987]

Constitutional Law – Detention by police under Internal Security Act – Application for habeas corpus – Grounds to justify detention – Whether person has acted or is about to act in a manner prejudicial to the security of the country – Subjective test applicable – Authority cannot be required to furnish facts whose disclosure would in its opinion be against the national interest – Affidavit by police officer giving facts – Allegation that losses sustained by a public bank where the depositors also include members of the public at large could result in organized violence by soldiers – Person detained released – Internal Security Act 1960, ss. 8 & 73 – Federal Constitution, arts. 149 & 151(3).

In this case the respondent had been arrested by a police officer, who deposed that he arrested and detained the respondent pursuant to section 73(1) of the Internal Security Act. At the time of the arrest, the officer explained to the respondent that he (the public officer) had reason to believe that there were grounds which justify the respondent's detention under section 8 of the Act and that he had acted in a manner prejudicial to the security of the country. The respondent instituted *habeas corpus* proceedings in the High Court. The police officer who arrested and detained the respondent gave an affidavit giving the facts which may summarised as follows.

At all material times the respondent was managing director of Malayan Commercial Services Sdn. Bhd., a company dealing in consultancy services. During the period October 1975 to August 1985, the respondent was also a director of the Perwira Habib Bank and a member of its loans committee. It was alleged that the respondent provided consultancy services through the said company which resulted in massive loans by the bank to various parties, thereby causing substantial losses to the bank. A police investigation of the alleged criminal breach of trust of monies during the respondent's tenure as director of the bank was undertaken during the first week of January 1987 and the respondent was interviewed for three days by the police in that connection.

According to Deputy Superintendent Basri bin Ismail, he had reason to believe that the substantial losses suffered by the bank were caused particularly through the acts of the respondent which evoked feelings of anger, agitation, dissatisfaction and resentment amongst members of the armed forces. The basis for the belief would appear to be as stated in paragraph 5 of his affidavit which read as follows:

"5. The Lembaga Tabung Angkatan Tentera holds 46.48 per cent of the shares of the bank. All servicemen in the armed forces who do not qualify for pension are required by law to contribute to the Tabung Angkatan Tentera. In addition, a large number of members of the armed forces are account holders of the bank."

After considering the lengthy affidavit of the police officer, the learned judge, Harun J., held that there was no evidence disclosed that the respondent has acted in any manner which is prejudicial to the security of the country and accordingly ordered the release of the respondent forthwith. The appellant appealed.

Held: (1) where a person who has been deprived of his liberty challenges the detention, it is for the authority to show that the person has been detained in exercise of a valid legal power. Once that is shown, it is for the detainee to show that the power had been exercised *mala fide* or improperly or made for a collateral or ulterior purpose;

(2) section 73(7) of the Internal Security Act 1960 states that a person detained pursuant to the powers conferred in the Act shall be deemed to be in lawful custody. The burden is consequently shifted to the detainee;

(3) what section 73(1) of the Act provides is that a police officer may arrest any person in respect of whom the officer has reason to believe there are grounds to justify the person's detention under section 8 of the Act and that person either has acted or is about to act in a manner prejudicial to the security of the nation. Section 73(1) and section 8 of the Act are so inextricably connected that the subjective test should be applied to both. The court cannot require the police officer to prove to the court the sufficiency of the reason for his belief under section 73(1). It follows that the learned judge was in error when he said in his judgment to the effect that if there is evidence that the applicant has acted in a manner prejudicial to the security of the country such evidence must be disclosed to the court to enable the court to be satisfied that the arrest and detention of the detainee under section 73 is justified in the circumstances;

(4) the learned judge was also in error to ignore the express provision of clause (3) of article 151 of the Federal Constitution for by that clause the authority cannot be required to furnish facts whose disclosure would in its opinion be against the national interest;

(5) if facts are furnished voluntarily and in great detail as in this case for consideration of the court, it would be naive to preclude the judge from making his own evaluation and assessment to come to a reasonable conclusion;

(6) in this case the learned judge thought it to be incredible that losses sustained by a public bank where the depositors also include members of the public at large could result in any organized violence by the soldiers. The court found it difficult to disagree with the learned judge on his conclusion.

Cases referred to:

(1) *Council of Civil Service Unions & Ors.* v. *Minister for the Civil Service* [1984] 3 All E.R. 935; [1985] A.C. 374.
(2) *J.P. Berthelsen* v. *Director-General of Immigration, Malaysia & Ors.* [1987] 1 M.L.J. 134.
(3) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 M.L.J. 129.
(4) *Re Ong Yew Teck* [1960] M.L.J. 67.
(5) *Liversidge* v. *Anderson* [1942] A.C. 206.

(6) *Reg.* v. *I.R.C. ex parte Rossminster* [1980] A.C. 952, 1011, 1025.
(7) *Merdeka University Bhd.* v. *Government of Malaysia* [1982] 2 M.L.J. 243, 246.

HIGH COURT.

G. Sri Ram (*S.C. Loh* and *S.S. Ma* with him) for the applicant.

T.S. Nathan, Senior Federal Counsel (*Cik Zaleha Zahari,* Senior Federal Counsel, with him) for the respondent.

Harun J.: The applicant was a director of the Perwira Habib Bank and a member of its loans committee from October 1975 to August 1985. At all material times, the applicant was and still is the managing director of Malayan Commercial Services Sdn. Bhd., a company providing consultancy services which he jointly owns. It is alleged that whilst the applicant was a member of the loans committee of the bank, he provided consultancy services through his company which resulted in the loans committee approving large sums as loans to various parties, thereby causing the bank to suffer substantial losses.

During the first week of January 1987, the Commercial Crimes Branch of Police Headquarters at Bukit Aman, Kuala Lumpur was investigating into possible offences of criminal breach of trust of monies belonging to Perwira Habib Bank during the applicant's tenure as director of the bank. The applicant was interviewed by the police for a period of three days in connection with these investigations.

On January 13, 1987 at about 11.00 a.m., the applicant was arrested by a deputy superintendent of police attached to the Special Branch of Police Headquarters, Bukit Aman, Kuala Lumpur at his office under section 73(1) of the Internal Security Act (ISA) and subsequently detained under section 73(3)(a) & (b) of the ISA. It is against this detention that this application for a writ of *habeas corpus* be issued.

At the time of his arrest, the applicant was informed that the reason for the arrest was because the police officer believed that there are grounds which would justify his detention under section 8 of the ISA and that he had acted in a manner prejudicial to the security of the country.

According to the police officer, he had "reason to believe that the substantial losses suffered by the bank caused by the manner in which loans were approved by the loans committee to certain parties, particularly through the acts of the applicant, has evoked feelings of anger, agitation, dissatisfaction and resentment among members of the armed forces and it is likely that such feelings may be ignited and lead to their resorting to violent action and thereby affect the security of the country."

All servicemen in the armed forces who do not qualify for pension are required by law to contribute to the Tabung Angkatan Tentera. The board of this fund holds 46.48 per cent of the shares of the Bank. It is the contention of the deputy superintendent that it is because of this substantial ownership of the bank's equity and the related losses that members of the armed forces are likely to resort to violent action.

On a percentage basis, the equity may be substantial, but no evidence was given as to the percentage of the fund that is invested in the Bank or the amount of money involved. Be that as it may, apart from the bare assertion of the arresting officer that members of the armed forces are likely to resort to violent action, there was absolutely no evidence before the court that the acts of the applicant are prejudicial to the security of Malaysia. It will be recalled that he had ceased to be a director of Perwira Habib Bank in August 1985 and holds no position in any organisation that will enable him to act or is able to act or likely to act in any manner prejudicial to the security of Malaysia. It follows that any threat to security must relate to his past acts prior to August 1985. He is certainly in no position to organise anything or instigate anyone to violent action. At most, his personal safety may be in danger but this is not a case of protective custody.

Section 73(7) ISA reads:

> "Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar places authorised generally or specially by the Minister."

This provision does not mean a complete ouster of the court's jurisdiction to issue a writ of *habeas corpus* because it is settled law that any exercise of power under a statute is subject to judicial review to ensure that the scope and limits of the power were not exceeded: see *Council of Civil Service Unions & Others* v. *Minister for the Civil Service.*(1) The effect of the provision, however, is that the burden of proof shifts to the appellant to

show that the detention is unlawful. I therefore cannot accept the contention of Mr. Selventhiranathan that once a person is arrested and detained under section 73(1) & (3), he has no recourse to the courts until a detention order is issued by the Minister under section 8. The main thrust of the applicant's case is that whatever offences he may be alleged to have committed are purely criminal in nature and there are adequate provisions under the Criminal Procedure Code to investigate the alleged offences and prosecute him in court in the normal way. Further, all documents seized by the police during his arrest relate to company matters and commercial dealings and none of a subversive nature or in any way involving national security.

On these facts, it is for the respondent to show that he has not exceeded his powers under section 73(1) & (3). The respondent attempted to do this through the affidavit of the arresting officer. In *J.P. Berthelsen* v. *Director-General of Immigration, Malaysia & Ors.*,[2] the Supreme Court at p. 138 said:

"We would add that in any event adequate evidence from responsible and authoritative sources would be necessary on the security aspect and no reliance can be placed in that regard on a mere *ipse dixit* of the first respondent to that effect in the notice of cancellation of the employment pass which the learned judge purported to accept without more ado."

In the present case, in the absence of any evidence on the security aspect, I held that there was no evidence that the applicant has acted in any manner which is prejudicial to security. It may well be that there is such evidence but it must be disclosed to the court, albeit confidentially even on a need-to-know basis, to enable the court to be satisfied that the arrest and detention of the applicant under section 73 is justified in the circumstances. It is not necessary to disclose the sources of the information which the police have. It will be sufficient to disclose the nature of the information.

Finally, it is to be observed that an arrest and detention under section 73(1) has two limbs, *viz:*

(a) grounds which would justify detention under section 8; and

(b) that the applicant has acted in any manner prejudicial to the security of Malaysia (on the facts applicable to this case).

The purpose of section 8 is to detain a person with a view to *preventing* him from acting in any manner prejudicial to the security of Malaysia. There must therefore be some evidence to suggest that the applicant is in a position to do something in the future which will affect the security of the country. There is absolutely no such evidence or suggestion thereof. The only evidence, if at all, is the suggestion that his past acts are prejudicial to the security of the country. This is not enough as both limbs of section 73(1) must be satisfied.

I accordingly issued the writ to release the applicant forthwith.

SUPREME COURT.

Tan Sri Abu Talib bin Othman, Attorney-General (*T. Selventhiranathan,* Senior Federal Counsel, with him) for the appellant.

G. Sri Ram (*S.C. Loh* with him) for the respondent.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the judgment of the court): On January 13, 1987, the respondent was arrested by a police officer (Deputy Superintendent of Police Basri bin Ismail) attached to the Special Branch, Police Headquarters, Bukit Aman, Kuala Lumpur. The officer deposed that he arrested and detained the respondent pursuant to section 73(1) of the Internal Security Act 1960 ("the Act"). At the time of the arrest, the officer explained to the respondent that he (the police officer) had reason to believe that there are grounds which would justify the respondent's detention under section 8 of the Act and that he had acted in a manner prejudicial to the security of the country.

On January 27, 1987, the respondent by originating motion of the same date instituted *habeas corpus* proceeding in the High Court, Kuala Lumpur. On February 11, 1987, Harun J. ordered the release of the respondent.

To get our perspective right, it may be useful to recapitulate at the outset that the writ of *habeas corpus ad subjiciendum,* commonly known as the writ of *habeas corpus,* is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from *unlawful* or *unjustifiable* detention whether in prison or in private custody. The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. The illegal detention of a subject, that is a detention or imprisonment which is

incapable of legal justification, is the basis of jurisdiction in *habeas corpus*. In any matter involving the liberty of the subject, the action of the Crown or its ministers or officials is subject to the supervision and control of the judges on *habeas corpus*. The right to the writ is a right which exists at common law independently of any statute, though the right has been confirmed and regulated by statute.

The Act was enacted under article 149 of the Federal Constitution. It is a legislation essentially to prevent and combat subversions and actions prejudicial to public order and national security. It is expressly provided in the Constitution that such a law as the Act is valid notwithstanding that it is inconsistent with article 5, 9 or 10 of the Constitution dealing with fundamental liberties. Article 151 of the Constitution provides for the procedure relating to preventive detention under any law or Ordinance enacted under that Part of the Constitution. Clause (3) of article 151 expressly provides that:

"This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest."

The facts furnished to the learned judge in the affidavit of Deputy Superintendent Basri bin Ismail may be summarised as follows. At all material times, the respondent was managing director of Malayan Commercial Services Sdn. Bhd., a company dealing in consultancy services. During the period October 1975 to August 1985, the respondent was also a director of the Perwira Habib Bank and a member of its loans committee. It was alleged that the respondent provided consultancy services through the said company which resulted in massive loans by the bank to various parties thereby causing substantial losses to the bank. A police investigation of the alleged criminal breach of trust of monies during the respondent's tenure as director of the bank was undertaken during the first week of January 1987 and the respondent was interviewed for three days by the police in that connection.

According to Deputy Superintendent Basri bin Ismail, he had reason to believe that the substantial losses suffered by the Bank were caused particularly through the acts of the applicant which evoked feelings of anger, agitation, dissatisfaction and resentment amongst members of the armed forces. The basis for the belief would appear to be as stated in paragraph 5 of his affidavit which read as follows:

"5. The Lembaga Tabung Angkatan Tentera holds 46.48 per cent of the shares of the bank. All servicemen in the armed forces who do not qualify for pension are required by law to contribute to the Tabung Angkatan Tentera. In addition, a large number of members of the armed forces are account holders of the bank."

After considering the lengthy affidavit of the police officer, the judge held that there was no evidence disclosed that the respondent has acted in any manner which is prejudicial to the security of the country and accordingly ordered the release of the respondent forthwith.

Section 73 of the Act reads as follows:

"73.(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe –

(a) that there are grounds which would justify his detention under section 8; and

(b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

(2) Any police officer may without warrant arrest and detain pending enquiries any person, who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found, and who the officer suspects has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

(3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:

Provided that –

(a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;

(b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and

(c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister.

(4) – (5) (Repealed).

(6) The powers conferred upon a police officer by subsections (1) and (2) may be exercised by any member of the security forces, any person performing the duties of

guard or watchman in a protected place and by any other person generally authorized in that behalf by a Chief Police Officer.

(7) Any person detained under the powers conferred by this section *shall be deemed to be in lawful custody*, and may be detained in any prison, or in any police station, or in any other similar place authorized generally or specially by the Minister."

Section 8(1) of the Act reads as follows:

"If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years."

The arrest and detention under section 73(1) is pending enquiries to see if an order under section 8 should be made by the Minister. It is clear from the language of the two sections that section 73 provides for the initial detention and cannot be divorced from section 8 of the Act which provides for the final detention.

Where a person who has been deprived of his liberty challenges the detention it is for the authority to show that the person has been detained in exercise of a valid legal power. Once that is shown it is for the detainee to show that the power had been exercised *mala fide* or improperly or made for a "collateral" or "ulterior" purpose. Section 73(7) states that a person detained pursuant to the powers conferred *shall be deemed to be in lawful custody*. Thus the burden is immediately shifted to the detainee.

Karam Singh v. *Menteri Hal Ehwal Dalam Negeri, Malaysia*[3] laid down the law on section 8 of the Act. Whether or not the facts on which the order of detention is to be based are sufficient or relevant is a matter to be decided solely by the executive.

There are no decided cases on section 73 of the Act but the rationale in the Singapore case of *Re Ong Yew Teck*[4] can by analogy be applied. There, the *habeas corpus* proceeding was in respect of an applicant arrested and detained under section 55 of the Criminal Law (Temporary Provisions) Ordinance 1955. The language of section 55(1) of the Singapore Ordinance is very similar to that of section 73(1) of our Act and likewise in the case of section 47 of the Ordinance and section 8 of our Act. The applicant there contended that the arrest was illegal on the grounds that when the detective corporal was making the arrest he had no reason to believe that there were grounds to justify detention under section 47 and that section 55(1) of the Ordinance imposes an objective test and the court could examine whether there was in fact sufficient reason to justify the detention. The crucial question raised was whether the language of section 55(1) of the Ordinance imposed an objective test. It was contended that since the jurisdiction of the police officer depends on whether he has reason to believe that there are grounds which would justify the detention of the applicant under section 47 of the Ordinance, then the existence of such reason is a condition precedent to the police officer's jurisdiction and that the facts constituting the reason are for the courts to find and appraise and not for the police officer. The only distinction between that case and the present case is that in the former case the detective corporal who effected the arrest was only the instrument of his superior officer, DSP Ong Kian Tiong. On this Chua J. said at p. 68.

"I now come to the crucial point. Who is to decide the issue of 'reason to believe'? D.S.P. Ong Kian Tiong himself of a court? If it is for the court to decide then the court must have all the material evidence before it otherwise it would be futile to ask the court to decide."

The judge then concluded that section 55(1) of the Ordinance imposed a subjective test.

Mr. Sri Ram for the respondent has urged us to dislodge *Karam Singh*. What in effect he was saying is that the ghost of *Liversidge* v. *Anderson*[5] should not cast any shadow on the Act and it should no longer be allowed to haunt the law. See also the speech of Lord Scarman (at p. 1025) in *Reg.* v. *I.R.C., ex p. Rossminster*[6] where the majority opinion in *Liversidge* v. *Anderson*[5] came under heavy attack.

But we would prefer to adopt a realistic rather than a pedantic approach on a matter such as this. We regard the preference for the objective approach to the subjective formula approved in *Merdeka University Bhd.* v. *Government of Malaysia*[7] as only a general proposition to be applied in normal judicial review cases.

Liversidge was detained under the infamous regulation 18B. Those detained under that regulation were not proved to be enemies of the state nor have they done anything actively hostile to the state. They were detained simply on suspicion that they might do something harmful to the security

of the state. Liversidge asked for particulars of the grounds on which the Home Secretary had "reasonable cause to believe". All the judges (save Lord Atkin) held that Liversidge was not entitled to the particulars. Lord Denning, never known for being conservative in his approach to the law, noted his disapproval of the classic dissent of Lord Atkin in his *Landmarks in the Law* (Butterworths 1984):

"The sentiments find an echo in the hearts of every Englishman. But this should not blind us to the fact that Lord Atkin's dissent was wrong. He was construing the words of regulation 18B in their objective sense: whereas they should have been construed – and were construed by all the others – against the background of the danger we were in and the necessity of combating the enemies in our midst."

In *Council of Civil Service Unions & Ors.* v. *Minister for the Civil Service*[1] the staff of the security headquarters (GCHQ) at Cheltenham had been members of civil service unions for many years. But those unions on several occasions took disruptive action which adversely affected the sensitive areas of the United Kingdom intelligence network. It was so serious that the ministers of the Crown decided that the unions should be banned from Cheltenham. The ban was put into effect by the Prime Minister who was the minister responsible for national security. Her action was contrary to the European Convention on the right of every person to form and join a trade union and it was also contrary to natural justice because she did not consult the trade unions or hear their case. When the appeal came before the House of Lords the appeal was dismissed. In the speech of Lord Diplock (at p. 407), it was made clear that the law relating to judicial review has reached the stage where it can be said with confidence that if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. The caveat is *if the subject matter is justiciable.* Thus Lord Diplock said at p. 412:

"The reason why the Minister for the Civil Service decided on December 22, 1983 to withdraw this benefit was in the interests of national security. National security is the responsibility of the executive government; what action is needed to protect its interest is, as the cases cited by my learned friend, Lord Roskill, establish and common sense itself dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves."

In *Council of Civil Service Unions & Ors.*, "the respondent has established that the work at GCHQ was a matter of grave national security, second, that that security would have been seriously compromised had industrial action akin to that previously encountered between 1979 and 1981 taken place, third, that consultation with the appellants prior to the oral instructions would have served only further to reveal the vulnerability of GCHQ to such industrial action, fourth, that it was in the interests of national security that that should not be allowed to take place, and fifth, that accordingly the respondent was justified in the interests of national security in issuing the instructions without prior consultation with the appellants." – per Lord Roskill at p. 423.

As adverted to earlier, we must be realistic rather than pedantic. As Ong C.J. said in *Karam Singh,* the problem requires a "realistic approach rather than as an exercise in semantics" (p. 141).

Here we are dealing with an Act authorised and enacted under the special provisions of the Constitution, namely, Part XI providing for "special powers against subversion, organised violence, and acts and crimes prejudicial to the public, and emergency powers".

In simple language, what section 73(1) of the Act provides is that a police officer may arrest any person in respect of whom the officer has reason to believe there are grounds to justify the person's detention under section 8 of the Act and that person either has acted or is about to act in a manner prejudicial to the security of the nation. The Penal Code defines "reason to believe" to mean "sufficient cause to believe". Who then is to decide what is sufficient cause under section 73(1) of the Act? That is the crux of the matter.

We hold that since section 73(1) and section 8 of the Act are so inextricably connected, the subjective test should be applied to both. The court cannot require the police officer to prove to the court the sufficiency of the reason for his belief under section 73(1). It follows that the learned judge was in error when he said in his judgment to the effect that if there is evidence that the applicant has acted in a manner prejudicial to the security of the country such evidence "must be disclosed to the court albeit confidentially even on a need-to-know basis, to enable the court to be satisfied that the arrest and detention of the applicant under section 73 is justified in the

circumstances." He made this unfortunate statement purporting to rely on *J. P. Berthelsen* v. *Director-General of Immigration, Malaysia & Ors.*[2] the passage at p. 138. In our view the passage should be read in the context of the paragraph in which it appears. *Berthelsen* was an immigration case. It dealt with the need to give a right to make a representation to an aggrieved person (in this case a foreign journalist) before his legitimate expectation (*i.e.* his employment pass) was to be withdrawn from him by the Immigration Authority. Such right of being heard must be given to him even though the grounds upon which the authority proposed to act were based on security considerations. In such case, whilst the authority was required to hear the representation from the aggrieved person, in no sense would it be bound to disclose any grounds or information which in its opinion would constitute security. This is entirely a matter for the authority concerned. *Berthelsen* is not an authority to say that the test of what constitutes security is an objective test; the case being entirely on a different fact-situation.

The learned judge was also in error to ignore the express provision of clause (3) of article 151 of the Constitution for by that clause the authority cannot be required to furnish facts whose disclosure would in its opinion be against national interest. But if facts are furnished voluntarily, exhaustively and in great detail as in this case for consideration of the court it would be naive to preclude the judge from making his own evaluation and assessment to come to a reasonable conclusion. In this case the learned judge thought it to be incredible that losses sustained by a public bank where the depositors also include members of the public at large could result in any organized violence by the soldiers. In fact, the person who alleged that was not even an army officer although subsection (6) of section 73 also empowers any member of the security force to act under that section. We found it difficult to disagree with the learned judge on his conclusion.

Appeal dismissed with costs.

Order accordingly.

Solicitors: *Sri Ram, Zulkifly & Kumar.*

FABRIQUE EBEL SOCIETE ANONYME v. SYARIKAT PERNIAGAAN TUKANG JAM CITY PORT & ORS.

[O.C.J. (Zakaria Yatim J.) May 25, 1987]
[Kuala Lumpur – Civil Suit No. C596 of 1984]

Civil Procedure – Application for final judgment – Conditions laid down – Infringement of trade mark – Requirements to be satisfied to prove infringement – Whether defendants have shown an arguable case – Trade Marks Act 1976, s. 38(1)(a) – R.H.C. 1980 O.14.

Trademarks – Infringement of – Requirements to be satisfied to prove infringement – Trade Marks Act 1976, s.38(1)(a).

In this case the plaintiff, the proprietor of the trade mark "EBEL" registered in Malaysia in respect of watches and part thereof, applied for summary judgment against the defendants in respect of infringement of the trade mark: (a) to restrain the defendants from infringing the plaintiff's registered trade mark; (b) for the delivery and destruction of all goods and articles that would offend against the injunction; and (c) for damages and costs.

Held: (1) the court has jurisdiction to enter summary judgment under Order 14 of the Rules of the High Court for an injunction;

(2) in order to suceed in its application for summary judgment under Order 14, the plaintiff must satisfy three conditions as laid down in the order: firstly, the defendants must have entered appearance; secondly, the statement of claim has been served on the defendants and, thirdly, the application for summary judgment must be supported by affidavit. In this case, the plaintiff has satisfied all the three conditions;

(3) in order to establish infringement of the trade mark, the plaintiff has to satisfy the following five requirements: (a) the defendants used the mark identical with the plaintiff's mark (b) the offending mark was used by persons who have not been authorised or licensed by the plaintiff (c) the defendants were using the offending mark in the course of trade (d) the defendants used the offending mark in relation to goods in respect of which the trade mark is registered (e) the defendants used the offending mark in such a manner as to render the use of the mark likely to be taken as being used as a trade mark. In this case, the plaintiff has satisfied all the five requirements;

(4) since the plaintiff is applying for summary judgment against the defendants on an action for infringement comparison must be made between the plaintiff's registered mark and the mark used by the defendants. Having made the comparison and having considered the evidence in the affidavits, the court was satisfied that the defendants had infringed the plaintiff's registered trade mark under section 38(1)(a) of the Trade Marks Act, 1976;

(5) from the affidavits and the statement of defence filed by the defendants, they have not disclosed any triable issue at all. Their defence is a bare denial without giving any particulars at all;

(6) the plaintiff's application for final judgment under Order 14 must therefore be allowed.